APPENDIX.

DECISION OF THE UNITED STATES SUPREME COURT IN THE INCOME-TAX CASES.

[BELOW is given the exact text of the second decision rendered by the Supreme Court of the United States in the income-tax cases. The decision was read by Chief Justice Fuller, in the presence of a full bench, five justices (Fuller, Field, Gray, Brewer and Shiras) voting in the affirmative, and four (Harlan, White, Brown and Jackson) in the negative. The first hearing of the cases was begun March 7, before a bench of eight justices (Justice Jackson being absent) and a decision was rendered April 8, declaring so much of the act of August 28, 1894, null and void as sought to impose a tax on the incomes derived from state, county or municipal bonds, and from the rentals of real estate. The decision of April 8 covered only a part of the ground in controversy, and the sitting judges being equally divided on the question of the constitutionality of the income-tax as a whole, the outcome was generally regarded as unsatisfactory. A rehearing before a full bench was therefore announced for May 6. The rehearing occupied three days and the decision was delivered May 20. The most noteworthy circumstance in connection with the rehearing was the change of attitude of one of the justices (Justice Shiras) who voted in favor of the validity of the statute at the first hearing and against it at the rehearing.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

	Charles Pollock, Appellant,	Appeals from the Circuit Court of the United States for the Southern District of New York.
893	*vs.*	
	The Farmers' Loan and Trust Company et al.	
894	*vs.*	
	The Continental Trust Company of the City of New York et al.	

[May 20, 1895.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the Court:

Whenever this court is required to pass upon the validity of an act of Congress as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and

care, and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power, and brings into consideration, as vitally affected by the decision, that complex system of government, so sagaciously framed to secure and perpetuate "an indestructible Union, composed of indestructible states."

We have, therefore, with an anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences.

The very nature of the Constitution, as observed by Chief Justice Marshall, in one of his greatest judgments, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." "In considering this question, then, we must never forget, that it is *a Constitution* that we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407.

As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several states in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while, as to the income from municipal bonds, that could not be taxed because of want of power to

tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. In *Gibbons* v. *Ogden* Mr. Chief Justice Marshall, with his usual felicity, said: "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." 9 Wheat. 188. And in *Rhode Island* v. *Massachusetts*, where the question was whether a controversy between two states over the boundary between them was within the grant of judicial power, Mr. Justice Baldwin, speaking for the court, observed: "The solution of this question must necessarily depend on the words of the Constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the Constitution." 12 Pet. 721.

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

And, passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention

and controlled its action and the views of those who framed and those who adopted the Constitution are considered.

We do not care to retravel ground already traversed; but some observations may be added.

In the light of the struggle in the convention as to whether the new Nation should be empowered to levy taxes directly on the individual until after the states had failed to respond to requisitions — a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected — it would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed.

This is forcibly illustrated by a letter of Mr. Madison of January 29, 1789, recently published,[1] written after the ratification of the Constitution, but before the organization of the government and the submission of the proposed amendment to Congress, which, while opposing the amendment as calculated to impair the power, only to be exercised in "extraordinary emergencies," assigns adequate ground for its rejection as substantially unnecessary, since, he says, "every state which chooses to collect its own quota may always prevent a federal collection, by keeping a little beforehand in its finances, and making its payment at once into the federal treasury."

The reasons for the clauses of the Constitution in respect to direct taxation are not far to seek. The states, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect to them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect to

[1] By MR. WORTHINGTON C. FORD in *The Nation*, April 25, 1895; republished in 51 *Albany Law Journal*, 292.

that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as states; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the states the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular states, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each state shall have two members of that body, and negatively that no state shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another.

Cooley (On Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax, imposed on the importation, exportation or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In the Constitution, the words "duties, imposts and excises" are put in antithesis to direct taxes. Gouverneur Morris recognized this in his remarks in modifying his celebrated motion, as did Wilson in approving of the motion as modified. 5 Ell. Deb. 302. And Mr. Justice Story, in his Commentaries on the Constitution (Sec. 952), expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by the framers of the Constitution, since in other clauses it was provided that "No tax or duty shall be laid on articles exported from any state," and that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison, as thrown into relief in the pages of the Federalist, and in respect of the enactment of the carriage tax act, and again to briefly consider the Hylton case (3 Dall. 171), so much dwelt on in argument.

The act of June 4, 1794, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. Bills were then pending in Congress to increase the military force of the United States, and to authorize increased taxation in various directions. It was, therefore, as much a part of a system of taxation in war times,

as was the income tax of the war of the rebellion. The bill passed the House on the twenty-ninth of May, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the Annals. "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it." Mr. Ames said: "It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had been long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so."

On the first of June, 1794, Mr. Madison wrote to Mr. Jefferson: "The carriage tax, which only struck at the Constitution, has passed the House of Representatives." The bill then went to the Senate, where, on the third day of June, it "was considered and adopted;" and on the following day it received the signature of President Washington. On the same third day of June the Senate considered "an act laying certain duties upon snuff and refined sugar;" "an act making further provisions for securing and collecting the duties on foreign and domestic distilled spirits, stills, wines, and teas;" "an act for the more effectual protection of the Southwestern frontier;" "an act laying additional duties on goods, wares and merchandise, etc.;" "an act laying duties on licenses for selling wines and foreign distilled spirituous liquors by retail;" and "an act laying duties on property sold at auction."

It appears then that Mr. Madison regarded the carriage tax bill as unconstitutional, and accordingly gave his vote against it, although it was to a large extent, if not altogether a war measure.

Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

In the thirtieth number of the Federalist, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: "The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their

admission, by a distinction between what they call *internal* and *external* taxations. The former they would reserve to the state governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head." In the thirty-sixth number, while still adopting the division of his opponents, he says: "The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the *direct* and those of the *indirect* kind . . . As to the latter, *by which must be understood duties and excises on articles of consumption*, one is at a loss to conceive, what can be the nature of the difficulties apprehended." Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, *first*, dividing the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second*, dividing the latter into *direct* and *indirect*, putting into the latter, duties and excises on articles of consumption.

It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time all internal taxes, except duties and excises on articles of consumption, fell into the category of direct taxes.

Did he, in supporting the carriage tax bill, change his views in this respect? His argument in the Hylton case in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the Federalist. After saying that we shall seek in vain for any legal meaning of the respective terms "direct and indirect taxes," and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and building. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." "*Duties, imposts and excises* appear to be contradistinguished from *taxes*." "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise*." "Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works, 328. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same reason

that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word "direct," so far as conflicting with his well-considered views in the Federalist, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject. He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in refering to contracts with citizens of a foreign country, said: "This principle, which seems critically correct, would exempt a well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases, indeed, the *income* or *annuity* is the property itself." 3 Hamilton's Works, 34.

We think, there is nothing in the Hylton case in conflict with the foregoing. The case is badly reported. The report does not give the names of both the judges before whom the case was argued in the Circuit Court. The record of that court shows that Mr. Justice Wilson was one and District Judge Griffin of Virginia was the other. Judge Tucker in his appendix to the edition of Blackstone published in 1803, (Tucker's Blackstone, vol. 1, part 1, p. 294,) says: "The question was tried in this state, in the case of *United States* v. *Hylton*, and the court being divided in opinion, was carried to the Supreme Court of the United States by consent. It was there argued by the proposer of it (the first Secretary of the Treasury), on behalf of the United States, and by the present Chief Justice of the United States, on behalf of the defendant. Each of those gentlemen was supposed to have defended his own private opinion. That of the Secretary of the Treasury prevailed, and the tax was afterwards submitted to, universally, in Virginia."

We are not informed whether Mr. Marshall participated in the two days' hearing at Richmond, and there is nothing of record to indicate that he appeared in the case in this court; but it is quite probable that Judge Tucker was aware of the opinion which he entertained in regard to the matter.

Mr. Hamilton's argument is left out of the report, and in place of it it is said that the argument turned entirely upon the point whether the

tax was a direct tax, while his brief shows that, so far as he was concerned, it turned upon the point whether it was an excise, and therefore not a direct tax.

Mr. Justice Chase thought that the tax was a tax on expense, because a carriage was a consumable commodity, and in that view the tax on it was on the expense of the owner. He expressly declined to give an opinion as to what were the direct taxes contemplated by the Constitution. Mr. Justice Paterson said: "All taxes on expenses on consumption are indirect taxes; a tax on carriages is of this kind." He quoted copiously from Adam Smith in support of his conclusions, although it is now asserted that the justices made small account of that writer. Mr. Justice Iredell said: "There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax, in all cases. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution."

What was decided in the Hylton case was then that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved a similar act. 3 Stat 40. The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment, the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded.

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible

means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assesssed."

Personal property of some kind is of general distribution; and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

The Congress of the Confederation found the limitation of the sources of the contributions of the states to "land, and the buildings and improvements thereon," by the eighth article of July 9, 1778, so objectionable that the article was amended April 28, 1783, so that the taxation should be apportioned in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years and three-fifths of all other persons, except Indians not paying taxes; and Madison, Ellsworth and Hamilton in their address, in sending the amendment to the states, said: "This rule, although not free from objections, is liable to fewer than any other that could be devised." 1 Ell. Deb. 93, 95, 98.

Nor are we impressed with the contention that, because in the four

instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge. Financial Statements, 32.

The dissenting justices proceeded in effect upon this ground in *Weston* v. *Charleston*, 2 Pet. 449, but the court rejected it. That was a state tax, it is true; but the states have power to lay income taxes, and if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial

whether it could have been originally taxed at all or not. This was admitted by the attorney-general with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution.

In England we do not understand that an income tax has ever been regarded as other than a direct tax. In Dowell's History of Taxation and Taxes in England, admitted to be the leading authority, the evolution of taxation in that country is given, and an income tax is invariably classified as a direct tax. 3 Dowell, (1884), 103, 126. The author refers to the grant of a fifteenth and tenth and a graduated income tax in 1435, and to many subsequent comparatively ancient statutes as income tax laws. 1 Dowell, 121. It is objected that the taxes imposed by these acts were not, scientifically speaking, income taxes at all, and that although there was a partial income tax in 1758, there was no general income tax until Pitt's, of 1799. Nevertheless, the income taxes levied by these modern acts, Pitt's, Addington's, Petty's, Peal's, and by existing laws, are all classified as direct taxes; and, so far as the income tax we are considering is concerned, that view is concurred in by the cyclopædists, the lexicographers, and the political economists, and generally by the classification of European governments wherever an income tax obtains.

In *Attorney-General* v. *Queen Insurance Co.*, 3 App. Cases, 1090, which arose under the British North America Act of 1867 (30 and 31 Vict. c. 3 sec. 92), which provided that the provincial legislatures could only raise revenue for provincial purposes within each province (in addition to licenses) by direct taxation, an act of the Quebec legislature laying a stamp duty came under consideration, and the judical committee of the Privy Council, speaking to Jessel, M.R., held that the words "direct taxation" had "either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in pop-

ular language." And considering "their meaning either as words used in the sense of political economy, or as words used in jurisprudence of the courts of law," it was concluded that stamps were not included in the category of direct taxation, and that the imposition was not warranted.

In *Attorney-General* v. *Reed*, 10 App. Cases, 141, Lord Chancellor Selbourne, said, in relation to the same act of Parliament: "The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question."

In *Bank of Toronto* v. *Lambe*, 12 App. Cases, 575, the Privy Council, discussing the same subject, in dealing with the argument much pressed at the bar, that a tax to be strictly direct must be general, said that they had no hesitation in rejecting it for legal purposes. "It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature."

At the time the Constitution was framed and adopted, under the systems of direct taxation of many of the states, taxes were laid on incomes from professions, business, or employments, as well as from "offices and places of profit;" but if it were the fact that there had then been no income tax law, such as this, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. As Chief Justice Marshall said in the Dartmouth College case: "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to

justify those who expound the Constitution in making it an exception.' 4 Wheat. 518, 644.

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property and the income of all persons in the state, and collect the same if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this, as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the Act of July 14, 1798 (1 Stat. 597, c. 75)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

In the disposition of the inquiry whether a general unapportioned tax on the income of real and personal property can be sustained, under the Constitution, it is apparent that the suggestion that the result of compliance with the fundamental law would lead to the abandonment of that method of taxation altogether, because of inequalities alleged to necessarily accompany its pursuit, could not be allowed to influence the conclusion; but the suggestion not unnaturally invites attention to the contention of appellants' counsel, that the want of uniformity and equality in this act is such as to invalidate it. Figures drawn from the census are given, showing that enormous assets of mutual insurance companies; of building associations; of mutual savings banks; large productive property of ecclesiastical organizations, are exempted, and it is claimed that the exemptions reach so many hundred millions that the rate of taxation would perhaps have been reduced one-half, if they had not been made. We are not dealing with the act from that point of view; but, assuming the data to be substantially reliable, if the sum desired to be raised had been apportioned, it may be doubted whether any state, which paid its quota and collected the amount by its own methods, would, or could under its constitution, have allowed a large part of the property alluded to to escape taxation.

If so, a better measure of equality would have been attained than would be otherwise possible, since, according to the argument for the government, the rule of equality is not prescribed by the Constitution as to Federal taxation, and the observance of such a rule as inherent in all just taxation is purely matter of legislative discretion.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand, equal and just, and on the other, elastic and certain; not that it is not open to abuse by such deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion, and inquisitorial in its methods; but because it is preeminently a tax upon the rich, and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States as "the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe, adequate to all emergencies, foreign or domestic, and having at its command for offense and defense and for all governmental purposes all the resources of the nation," would be "but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property throughout the United States without apportionment.

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution, which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to state lines, and in such manner that the states cannot intervene by payment in regulation of their own resources, lest a government of delegated powers shall be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision.

In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare.

Differences have often occurred in this court — differences exist now — but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand.

If it be true that the Constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment. In no part of it was greater sagacity displayed. Except that no state, without its consent, can be deprived of its equal suffrage in the Senate, the Constitution may be amended npon the concurrence of two-thirds of both houses, and the ratification of the legislatures or conventions of the several states, or through a Federal convention when applied for by the legislatures of two-thirds of the states, and upon like ratification. The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis and opinion to exhaust themselves, and for the sober second thought of every part of the country to be asserted.

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren* v. *Charleston*, 2 Gray 84, is applicable,

that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in *Poindexter* v. *Greenhow*, 114 U. S. 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." And again, as stated by the same eminent judge in *Spraigue* v. *Thompson*, 118 U. S. 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333, Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or

vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 24, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the Act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

True copy.

Test: JAMES H. MCKINNEY,
Clerk Supreme Court U. S.